IN THE

Supreme Court of the United States

October Term 1979
No. 79-712

C. NEIL ASH and ELAINE T. ASH,

Petitioners,

vs.

TRUSTEES FOR WESTGATE-CALIFORNIA CORPORATION,

Respondents.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

C. NEIL ASH,
202 South Mansfield Avenue,
Los Angeles, Calif. 90036,
(213) 939-7872,
In Propria Persona and Attorney for Elaine T. Ash.

January 28, 1980.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term 1979
No. 79-712

C. NEIL ASH and ELAINE T. ASH,

Petitioners,

vs.

TRUSTEES FOR WESTGATE-CALIFORNIA CORPORATION,

Respondents.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

This is a petition for rehearing of the Order of this Honorable Court entered on January 7, 1980, denying Petitioners' petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

This petition is based upon: (1) an intervening conflicting decision by the court of appeals of another Circuit which accentuates the absence of uniformity in the Circuits upon an important question of federal law which should be settled by this Honorable Court; and (2) substantial grounds available to Petitioner although not previously presented.

1. The principal question presented by Petitioners' petition for writ of certiorari is the standard of causation with respect to disclosure under the federal securities laws in connection with a *required* shareholders'

vote. The decisions in the Circuits continue to conflict on this important issue.

The issue was briefed at length by Petitioners and Respondents in the Court of Appeals for the Ninth Circuit. Respondents urged affirmance of the strict standard of causation, which was adopted hereinbelow by the United States District Court for the Southern District of California (the "Reorganization Court"), and repeatedly cited *Barnett v. Anaconda Co.*, 238 F. Supp. 766 (S.D.N.Y. 1965) as the leading authority. See footnote 7, *Mills v. Electric Auto-Lite Company*, 396 U.S. 375, 385-386 (1970).

The Court of Appeals was confronted with numerous unrelated issues in the three appeals consolidated for hearing from the Reorganization Court's decision approving the Air California merger. However, albeit in a footnote to its Opinion, the Court of Appeals clearly affirmed the strict standard of causation, remarkably even to the extent of employing the very same "foregone conclusion" language of the strict standard enunciated in *Barnett, supra,* 768.

Subsequent to the filing of Petitioners' petition for certiorari, the Court of Appeals for the Second Circuit again rendered a decision in accord with the heretofore prevailing liberal *Mills* standard of causation. *Weisberg v. Coastal States Gas Corporation*, CCH Fed. Sec. Law Rptr. §97,168, 96,435 (2nd Cir. November 8, 1979). There remains an undeniable absence of uniformity in the Circuits on a standard of causation when the required disclosure of information itself (whether by proxy solicitation or distribution of an information statement in connection with a *required* shareholders' meeting vote) is "an essential link in

the accomplishment of the transaction." *Mills, supra,* 385.

2. The Court of Appeals for the Ninth Circuit, with the acquiescence of the Securities and Exchange Commission, permitted a lower standard of disclosure for an arm of the Reorganization Court—its own appointed fiduciaries.

Petitioners have not heretofore presented these grounds because of their belief that such ought not to be determinative of the issues presented for this Honorable Court's review. Petitioners were wrong. Petitioners are obligated to submit the following because not only can it be determinative of Petitioners' petition but it goes to perhaps a much more important issue—the administration of justice.

In light of the several *uncontroverted* nondisclosures of information, the materiality of which was either assumed arguendo by the Reorganization Court or, without explanation, limited by the Court of Appeals to a mere exercise of appraisal rights, the reason for the Ninth Circuit's judicial bypass of fair and informed corporate suffrage for Air California's minority shareholders is not readily apparent. Was there some other dominant influence?

The Westgate reorganization proceeding is renowned as one of the largest and most complex in American business history. The Trustees' Report, which was incorporated within the information material furnished to the minority shareholders (Appendix V to the Information Statement), depicts C. Arnholt Smith as the villain and credits the Trustees with the commencement of numerous "major constructive actions". District Judge Nielsen of the Reorganization Court holds not

only his own appointed Westgate Trustees but also the other directors of Air California in highest personal esteem (Reptr. Tr. 10-4-77, p. 195).* Perhaps naturally, Judge Nielsen did not receive with alacrity Petitioners' contention that the Trustees had violated the securities laws. Having previously ex parte authorized the Trustees upon the basis of a preliminary copy of the Air California Information Statement to vote Westgate's holding in favor of the merger at the required special meeting of shareholders, the Reorganization Court had long prior to its hearing of Petitioners' objections and its formal approval of the merger already as a practical matter indicated its satisfaction with the disclosure in the Information Statement and decided that the merger was essential to any successful reorganization of Westgate. It is understandable that the Ninth Circuit's Court of Appeals also might have been sympathetic to the long-time efforts of the Trustees to reorganize Westgate as compared with the notorious mismanagement of the past.

A successful reorganization of Westgate may be a worthy cause. It seems now to be favored by almost all concerned. In fact, the Securities and Exchange Commission (the "SEC"), the advisor to the Reorganization Court in the Chapter X proceedings, appeared at the first hearing on the merger proposal before the Reorganization Court and also authorized the Trustees' counsel to advise the Reorganization Court that the Commission "would be very supportive that the merger be consummated", provided that (with the Commission's customary standard disclaimer) the Court were

*Citations herein to the record to be filed with the Clerk of this Honorable Court are by reference to their designation in Petitioners' petition for writ of certiorari.

to determine it to be fair (Reptr. Tr. 10-4-77, p. 201). With a deaf ear toward the complaints of Air California's minority shareholders, whose ownership was outside the Westgate reorganization, the Commission has since remained silent in regard to the merger transaction. Undoubtedly this silence was a significant influence upon the Ninth Circuit's consideration of Petitioners' contentions regarding violations of the securities laws.

According to the aforementioned Trustees' Report (pp. 20 and 21), the SEC and the Trustees have not always shared the same viewpoint with the Comptroller of the United States regarding Westgate's future. The Report, referring to litigation between the Trustees and the Federal Deposit Insurance Corporation ("FDIC"), is highly critical of the FDIC and to a lesser degree the Internal Revenue Service vis-a-vis the SEC's involvement in Westgate's financial affairs. Petitioners have never been, and are not now, in any way involved in the disputes of the Trustees and the SEC with other governmental agencies. For the Commission to sponsor a transaction and then subsequently admit that it involved violations of the securities laws, no doubt, would be embarrassing to the Commission in its relationship with other governmental agencies and the public. While the Commission publicly cries out against conflict of interests on the American business scene, its appetite for disclosure disappears when it is confronted with its own dish of rules. Can anyone honestly say that if the nondisclosures of material information in this case were by independent businessmen, not by court appointed trustees in a transaction sponsored by the SEC, the SEC would have remained silent? How droll! This double standard is reprehensible.

The circumstances of the Commission's role in the Air California merger classically support the purpose of Congress' enactment of Chapter 11 of the new Bankruptcy Code. "Congress recognized that within an adversary reorganization process there is an inherent conflict between the SEC's role as a representative of public investors and its role as expert advisor to the court." *Collier on Bankruptcy*, Vol. 5, p. 1109-8.

With its own appointed Trustees urging the merger and the Commission in an advisory capacity recommending the transaction, it is not too surprising that the Reorganization Court improperly adopted a lower standard of disclosure for the Trustees. With the SEC, in the face of Petitioners' contentions, not heard to complain about the nondisclosures, the Reorganization Court, as well as the Ninth Circuit's Court of Appeals, from a politic viewpoint, had less reason to be concerned with the complaint of a mere minority shareholder. In response to the inadequacy of disclosure in the information material of the Trustees' conflicting interests, the Trustees, contrary to the spirit of Rule 14c-6(b) of Regulation 14C of the Securities and Exchange Act of 1934, emphasized in their argument to the Reorganization Court that "the information statement was reviewed by the Commission . . . a responsible agency". (Reptr. Tr. 2-14-77, p. 35). In any event, as District Judge Nielsen said when confronted with the nondisclosure of conflict of interests of the Trustees —"What difference would it make? . . . They [Westgate] had plenty of votes" (Reptr. Tr. 10-4-77, p. 196). Petitioner submits that the Ninth Circuit's Court of Appeals was under the same power influence.

In recent years under the wise judgment of this Honorable Court the federal securities laws have not

been expanded beyond their intended purposes; however, Congressional concern remains undiminished in regard to nondisclosed material information, particularly conflict of interests, *regardless of persons*. Petitioners urge this Honorable Court not to countenance an exemption by the judiciary of its own appointees from the same standards under the law demanded of others.

What is the role of Petitioners? Although Air California's minority shareholders voted 10 to 1 against the merger, the Ninth Circuit's Court of Appeals was impressed that "[o]nly Woolsey and the Ashes remain of the former shareholders" (JA 17)—only three complaining shareholders now among approximately 1,000 former Air California shareholders, aside from a multitude of Westgate shareholders and creditors. Why would Petitioners, without the support of the SEC and at great personal expense to themselves, persist in this proceeding? Do Petitioners hope to hold-up Respondents for exorbitant legal fees? No! Petitioners asked the Court of Appeals for attorney fees of $1.00; their motivation is simply to obtain their right "of fair and informed corporate suffrage" under the law. See *Mills, supra*, 396.

To paraphrase the oft-quoted Justice Holmes, if this Honorable Court does not grant certiorari, "civilization will not come to an end", but unmistakably the administration of justice in these United States of America will have bowed not to law but to persons. Petitioners are aware of the inertia of this Honorable Court's initial denial of certiorari. The odds appear to be overwhelmingly against Petitioners because in a sense this Honorable Court is asked now to reverse itself by granting certiorari. Yet, Petitioners know that this

Honorable Court is not governed by odds but by justice. This Honorable Court is asked to replace the blindfold over the eyes of the lady.

Respectfully submitted,

C. NEIL ASH,

In Propria Persona and Attorney for Elaine T. Ash.

January 28, 1980.

IN THE

Supreme Court of the United States

October Term 1979
No. 79-712

C. NEIL ASH and ELAINE T. ASH, *Petitioners,*

vs.

TRUSTEES FOR WESTGATE-CALIFORNIA CORPORATION, *Respondents.*

Certificate of Counsel in Support of Petition for Rehearing.

I, C. Neil Ash, In Propria Persona and Attorney for Elaine T. Ash in the above-entitled case certify as follows:

1. That I am a member of this Honorable Court; and I have been for 31 years, and I am now, an active member of the State Bar of California;

2. That I have been for over 25 years, and I am now, actively engaged in the practice of corporate law as counsel for a major American corporation, which in no manner whatsoever is interested in the above-entitled case; and

3. That the accompanying Petition for Rehearing of Order Denying Petition for Writ of Certiorari is presented in good faith and not for delay and that the accompanying Petition is restricted to the grounds specified in Rule 58(2) of this Honorable Court.

C. NEIL ASH,

In Propria Persona and Attorney for Elaine T. Ash.

January 28, 1980